Supreme Court, U.S.
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No. 94

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MOBILE MEDEX, INC.,
Petitioner,

v.

RAYMOND L. BRAMUCCI, INDIVIDUALLY
AND AS COMMISSIONER OF LABOR,
OF THE STATE OF NEW JERSEY
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the lower courts need instruction to enforce the Federal Rules of Civil Procedure and prior determinations with regard to the following:

a: Whether or not the District Court properly ruled upon the issue of recusal.

b. Whether or not the District Court properly allowed for the consideration of a certain memorandum compiled by the State of New Jersey which confirms that the cause of delay did rest with the State of New Jersey. The trial court first ruled that the Proposed Amendment to the pleadings was otherwise futile, and yet then excluded the "evidentary matter" as submitted in a belated fashion nothwithstanding that the

trial court considered the Motion to Amend the Pleadings and the Motion to Dismiss the Complaint at the same time.

c. Whether or not upon the consideration of the aforementioned document, the District court properly refused jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C.A. 1341 and properly dismissed the complaint asserted by the Plaintiff.

PARTIES TO THE PROCEEDING

The Petitioner, Mobile Medex, Inc. is incorporated in the State of New Jersey.

The Respondent, Raymond L. Bramucci, did serve as the Commissioner of the Department of Labor of the State of New Jersey.

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RAYMOND L. BRAMUCCI, INDIVIDUALLY
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Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Mobile Medex, Inc. respectfully pray that a Writ of Certiorari issue to review a Judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

On April 26, 1993, the United States District Court for the Third Circuit granted the Motion on behalf of Raymond L. Bramucci for Summary Judgment. (A-1) Thereafter, the District Court for the District of New Jersey denied the Motion for the reconsideration of the prior dismissal of the Complaint.(B-1) The District Court also refused to disturb the earlier ruling by Magistrate Chesler denying leave to assert an amended complaint in this matter. Thereafter, the District court declined to withdraw or remove Herself and denied a motion by the Petitioner which sought that relief. All of these matters were raised upon an appeal which was denied by the United States court of Appeals on May 27, 1994.

(E-1) On June 7, 1994, the United States Court of Appeals for the Third Circuit refused to grant a Petition for a rehearing in this matter.(F-1)

JURISDICTION

On May 27, 1994, the Third Circuit denied the appeal that was brought in this matter. (E-1) On June 7, 1994, the Third Circuit Court of Appeals denied the application to rehear this case. (F-1) This Court has jurisdiction to review the decision by Writ of Certiorari under 28 U.S.C.A 1254(1).

STATUTORY PROVISIONS

The District Courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy and efficiient remedy may be had in the courts of such state.

28 U.S.C.A. 1341

STATEMENT OF THE CASE

On or about March 28, 1978, the New Jersey Department of Labor conducted an audit of the Appellant, Mobile Medex, Inc. The purpose of this audit was to ascertain whether or not certain paramedical examiners belonging to Mobile Medex, Inc. were to be considered as employees pursuant to the New Jersey Unemployment Compensation Law, N.J.S.A. 43:21-1 et. seq. (West 1991).

After the delay of more than a decade, which was not attributable to the plaintiff, the unresolved dispute was passed on to the New Jersey Office of Administrative Law.

On September 15, 1989, the Honorable Edith Klinger, A.L.J. heard the testimony which was presented by each party. On or about January 11, 1990, Judge Klinger did issue an initial decision wherein the assessment of the Department was dismissed by Her Honor. Thereafter, the Respondent sought further review by the New Jersey Commissioner of Labor. On or about April 12, 1990, the Chief Legal Officer, Mr. Alfred Vuocolo for the New Jersey Department of Labor did prepare a draft of the final opinion for the Commissioner of Labor, or approve same as to form for consideration by Mr. Bramucci. The Commissioner failed to request the transcript of the proceedings before the Office of Administrative Law before proceeding to modify the facts as found by the Office of Administrative Law. The absence of any review of the

testimony or a summary thereof before proceeding to reverse the proper determination by the Judge of the Office of Administrative Law allowed the Commissioner entirely and to impermissibly disregard the outcome of the only fair and complete hearing which was extended to the Plaintiff, Mobile Medex, Inc. Through discovery in this matter, the plaintiff has reviewed the Memorandum to the Commissioner of Labor from the Chief Legal Officer dated April 12, 1990 wherein the Chief Legal Officer submits the proposed opinion for final review by the Commissioner. It appears that the Chief Legal Officer, who is operating without the transcript of proceedings below, did direct the reversal of the determination by the Office of Administrative Law. It is submitted that the Commissioner of Labor

adopted the position of the Department of Labor, without also granting equal recognition of the position of the taxpayer.

Upon his review of the draft opinion, the Commissioner of Labor did not review any of the record including the decision by the Honorable Edith Klinger A.L.J. Instead, he claimed to have, at that point, begun a round of consultation(s) with other senior officials of the New Jersey Department of Labor before approving his opinion in this matter. Yet, there is no documentary evidence to confirm that Mr. Bramucci consulted with the Chief Legal Officer who was charged with the drafting of the opinion. On April 16, 1990, the Commissioner of Labor issued an opinion wherein the assessment asserted by the Department of Labor was reinstated

pursuant to this Order. The Commissioner modified the finding(s) of fact and reversed the legal determination(s) of the Administrative Law Judge. Thereafter, on May 14, 1990, the Plaintiff filed a Notice of Appeal with the Clerk of the Appellate Division of the Superior Court of New Jersey. On March 27, 1991, the Appellate Division entered the following opinion:

> We are satisfied from our study of the record and arguments presented that the Commissioner's decision holding paramedics not to be independent contractors pursuant to N.J.S.A. 43:21-19 (1) (6) (A), (B), and (C) is neither arbitrary, capricious nor unreasonable, does not lack full support in the record, and does not violate legislative policies expressed or fairly implied in the statutory scheme administered by the Department of Labor. See also R. 2:11-3 (e) (1) (D) and (E).

On April 16, 1991, the Plaintiff

filed a Petition for Certification with the Supreme Court of New Jersey. This application was denied on September 6, 1991. An application for reconsideration of the aforementioned denial of the Petition for Certification was likewise denied by the New Jersey Supreme Court on January 16, 1992.

2 A review of the April 12, 1990 Memorandum from the Chief Legal Officer to Mr. Bramucci unequivocally demonstrates that no prior discussions occurred prior to the presentation of the draft opinion to the Commissioner. It appears that he blindly accepted the determination of his staff without any discussion. The memorandum states:

> In reversing the decision, the attached Order refers to numerous administrative and judicial decisions supporting our position. Among these is a recent administrative law decision involving the identical factual situation.
>
> If you agree with the Order, please sign at the clip and return to my office for processing.

On July 10, 1992, the instant matter was commenced in the United States District Court for the District of New Jersey. With respect to the determination by the Commissioner of Labor, on April 16, 1990, the Plaintiff contends that the Commissioner did, or allowed, all of the following which are prohibited by our Constitution. These include: (1) the failure to review the transcript of proceedings before the Office of Administrative Law before the modification of facts which were found by the Administrative Law Judge; and (2) the failure of the Commissioner to review any part of the record before rendering his decision in the case (3) and failing to demonstrate any knowledge or independent thought in the disposition of the matter2. In the Opinion by the Commissioner of Labor on

April 16, 1990, Mr. Bramucci expressly stated that he had reviewd the transcript and the record before the rendering of his decision in this matter.

The Commissioner of Labor stated as follows:

> ...Having considered the record and the Administative Law Judge's initial decision, and having made an independent evaluation of the record, I have accepted and adopted her findings of facts with the modifications noted below.
> Emphasis added.

On December 14, 1992, the parties conducted the deposition of the Commissioner of Labor. In that proceeding, Mr. Bramucci testified with regard to the manner in which he conducted his deliberation in this case.

However, the Appellant, Mobile Medex, Inc. contends that two (2) documents which were acquired in discovery are very illustrative and

dispositive of the real manner in which this case was resolved by the Commissioner of Labor. Four (4) days before the issuance of the formal and final opinion by the Commissioner of Labor, the Chief Legal Officer did submit a draft of the opinion for the approval of the Commissioner of Labor. The Chief Legal Officer fails to confirm any prior consultation with the Commissioner of Labor. Nor does the subordinate request or suggest that there should be any further critique or deliberations before the issuance of the opinion by the Commissioner of Labor. Contrary to Law, the Commissioner of Labor did not issue a decision that reflected the required independent thinking and judgment, but simply allowed for the ratification of the position of the New Jersey Department of

Labor.

A second document was acquired through discovery that clearly established that the inordinate and excessive delay in the dispostion of the initial administrative matter clearly rested with the State of New Jersey. New Jersey Deputy Attorney General, Bessie Sacco, on October 3, 1989, advised the Department of Labor, in a confidential memorandum made available in discovery, that the many, many years of delay was not attributable to the Appellant, Mobile Medex, Inc. Ms. Sacco states:

> By way of brief background, on March 6, 1978 Mobile Medex was assessed $5,355.50 for the third quarter of 1974 through the fourth quarter of 1977. A hearing was requested by Mobile Medex and pursuant thereto in June, 1979, Chester Just conducted a hearing in this matter. <u>However, Chester Just did not render his decision in this matter until July of</u>

1985--some six years later. Mobile Medex filed an objection to Mr. Just's decision by letter dated July 26, 1985. A decision was issued by James A. Ware, Director, affirming Chester Just's decision on August 22, 1985. Thereafter, on September 3, 1985, Mobile Medex appealed the decision of Director Ware to the Commissioner of Labor. By letter dated September 12, 1985, Audley Clark acknowledged receipt of Mobile Medex's appeal. In the meantime, the Department of Labor performed an updated audit on Mobile Medex covering the audit period 1981 through 1984. As a result, on December 23, 1985, a Assessment for 1981 through 1984 was issued to Mobile Medex. Upon receipt of this notice, by letter dated December 30, 1985, Mobile Medex requested that the assessments for 1981 through 1984 be added to Mobile Medex's current appeal before the Commissioner of Labor. This letter was sent certified and was signed for by the Department of Labor on January 3, 1986. However, a Commissioner of Labor decision was never rendered in this matter.

Subsequently, the Department of Labor audited Mobile Medex up through 1987. By letter April

28, 1988, Mobile Medex was advised the total due from 1981 through 1987 was $12,008.39. Mobile Medex filed a petition for a hearing on May 5, 1988. When this matter was pre-heard by Judge Klinger back in October of 1988, it was discovered that the Commissioner of Labor never rendered a final decision on the 1974 through 1977 or the 1981 through 1984 assessment. This case was placed on the inactive list and during this time, it was confirmed that the 1974 through 1977 assessment was being withdrawn due to the prejudicial delay involved. At this time, Mobile Medex requested that the Commissioner of Labor render a final decision in this matter regarding the 1981-1984 assessment. By letter dated May 8, 1989, the Commissioner of Labor advised Mobile Medex that the Commissioner of Labor would not consider the 1981 through 1984 assessment until the matter was heard by the Office of Administrative Law. It was explained to Mobile Medex that it was improper procedurally for it to have added the 1981 through 1984 assessment to the 1974 through 1977 appeal to the Commissioner of Labor. However, Mobile Medex was never advised until recently that its December 30, 1985 appeal was

> procedurally improper. Additionally, there were no regulations in place during this time which would have precluded Mobile Medex from adding the 1981 through 1984 assessment to the 1974 through 1977 appeal. Thus, what basically happened in this case was that Mobile Medex appealed the 1981 through 1984 assessment on December 30, 1985 and was not afforded a hearing regarding this appeal until September, 1989.

(emphasis added.)

After the completion of the aforementioned discovery and on February 8, 1993, the Magistrate improvidently denied the Motion by the Appellant, Mobile Medex, Inc. for Leave to File a Second Amended Complaint ir this matter. The Magistrate found that the proposed amendment was not timely.

Thereafter, the Honorable Mary Anne Trump Barry, U.S.D.J. considered the motion to dismiss the complaint, by the Commissioner of Labor, for lack of subject matter jurisdiction. As part of the identical Order and at the same time, on April 26, 1993, the District Court affirmed the prior determination by the Honorable Stanley R. Chesler, U.S.M.J., by denying the motion for leave to amend the pleadings. (A-1) Judge Barry proceeded to grant the Motion by the Commissioner of Labor for the dismissal of the complaint for lack of subject matter jurisdiction. (A-1) Thereafter, the Appellant, Mobile Medex, Inc. moved for the reconsideration of each of the aforementioned determinations. On June 22, 1993, Judge Barry denied the entire motion for reconsideration. (B-1) The District

Court improvidently denied to Plaintiff the opportunity to offer the aforementioned document in support of the argument that the Tax Injunction Act, 28 U.S.C.A. 1341, cannot bar this action, when in fact the document was acquired by discovery and had been preiously submitted to the Magistrate in the same civil action.

On August 26, 1993 the District Court advised Counsel for the Appellant, by letter, that there was no basis for the recusal of the District Court Judge. In this letter, the Court wrongly declared that there were no other sitting judges that were free to dispose of the matter because each one supposedly faced the same prospect of advancement to the Third Circuit.(C-1) However, there are and have been two (2)

judges within the District of New Jersey, who are on senior status, and thus in fact, do not confront the prospect of promotion.

Thereafter, the District Court denied the application for the recusal of the trial Court. (D-1) An appeal was pursued to the Third Circuit Court of Appeals. On May 27, 1994, the Court of Appeals affirmed the determination of the District Court of New Jersey. (E-1) On June 7, 1994, the Court belowed turned away the Petition for a re-hearing of the matter. (F-1)

REASONS FOR GRANTING THE WRIT
SUMMARY OF ARGUMENT

The Third Circuit Court of Appeals refused to find that the District Court failed to consider the underlying merits of the recusal application pursuant to 28 U.S.C.A. 455. Secondly, the District Court failed to consider the submission of a certain memorandum as timely, although the document was submitted shortly before to the Magistrate under the same matter. The District Court ruled that the Pending Motion relative to this memorandum was futile, and subsequently treated this "evidentary matter" as late. Having wrongly ruled that this information could not be considered by the Court, the Court proceeded to find that there was no lack

of a "speedy" remedy and no demonstration of the inadequacy of the state tax remedy. The Court improperly dismissed the complaint for lack of subject matter jurisdiction, pursuant to the Tax Injunction Act, 28 U.S.C.A. 1341.

POINT I

THE THIRD CIRCUIT COURT OF APPEALS AFFIRMED A PRE-TRIAL CONFERENCE ORDER, AS IMPOSED BY THE DISTRICT COURT, THAT VIOLATED F. R. CIV. PRO. 16 (a) (3) WHICH PROHIBITS WASTEFUL PRE-TRIAL ACTIVITIES.

Federal Rule of Civ. Procedure 16 (a) provides as follows:

> (a) Pretrial Conferences; Objectives. In any action, the court may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as....
> (3) discouraging wasteful pretrial activities.

(emphasis added)

The Initial Case Management Order, which gave rise to the basis for the denial of the application for leave to assert an Amended Complaint in this matter was clearly in contravention of the aforementioned rule. The termination of the time period for the submission of Motions prior to the close of the period

for the completion of discovery clearly violates Rule 16 of the Federal Rules of Civil Procedure.

The application for Leave to assert an Amended Complaint was denied as the time for filing this Amended Complaint had expired even though discovery continued past this date. If discovery of all kinds is otherwise permitted to continue until a specific date, any other use of the same discovery, such as the commencement of certain related and dependent motions must also be allowed within the same period of time. The Courts below impermissable and wrongfully enforced the terms of the Pre-Trial Order so as to deny permission to assert a Seond Amended Complaint in this proceeding.

The Court below must not be able to selectively enforce the Federal Rules of Civil Procedure in a selective manner.

POINT II

THE COURT OF APPEALS IMPROVIDENTLY AFFIRMED THE DETERMINATION OF THE DISTRICT COURT REGARDING THE REFUSAL OF THE TRIAL COURT TO WITHDRAW FROM THIS MATTER.

Subsequent to the determination by the Honorable Mary Anne Trump Barry, U.S.D.J., the plaintiff, Mobile Medex, Inc. sought the recusal of the District Court which has no timeliness requirment pursuant to 28 U.S.C.A. 455. The Court, first in a letter, refused to recuse herself and declared that since there were no other sitting judges within the District of New Jersey that did not likewise hold an equal prospect for advancement to the Third Circuit, the

Court would not consider the balance of the recusal application. (C-1)

The Court was as wrong as wrong could be with respect to these two (2) determinations. The recusal statute, 28 U.S.C.A. 455 does not have a timeliness requirement. The Third Circuit Court of Appeals did declare so in Jones v. Pittsburgh National Corp., 899 F.2d 1350, 1356 (3rd Cir. 1990).

Similarly, there were two (2) District Court Judges on senior status in the District of New Jersey when this recusal issue was confronted by Judge Barry. One of these judges did include the Honorable Clarkson Fisher, U.S.D.J., a former Chief Judge of the entire District of New Jersey.

The manner by which the trial Court ignored a full consideration of the question of the withdrawal of the Court

was clearly contrary to the law, and is an ample demonstration of a trial Court that selectively enforces the rules and the legal precedent of this Court and with regard to the Third Circuit Court of Appeals.

POINT III

THE IGNORANCE OF FED. R. CIV. PRO. 16 AND THE IMPROPER DISPOSITION OF THE RECUSAL ISSUE IS ILLUSTRATIVE OF A TRIAL COURT THAT HAS NO REGARD FOR THE RULE(S) OF FEDERAL CIVIL PROCEDURE AND ANY PRIOR DETERMINATIONS

The systemic failure of the lower courts, in this instance, and others, to strictly enforce the Rules of Civil Procedure and the precedents is a problem that has unfortunately persisted in one form or another from the founding of the United States. However, these failures must be expunged from the Federal Courts at this time and forever more.

Recently, similar allegations were made against the father of our Declaration of Independence and early President of the United States, Thomas Jefferson. On or before June 24, 1994,

the Chief Justice of the United States, William H. Rehnquist was called upon to preside as the Association of the Bar of the City of New York convened to consider the same problem in the life of Thomas Jefferson that caused the petitioner Mobile Medex, Inc., to be denied a fair proceeding in the Federal Courts. The Association of the Bar of the City of New York was confronted with a learned man who allegedly had failed to properly regard both the Bill of Rights and the Declaration of Independence in his own life for whatever other extraneous or political reason(s).(G-1) Unfortunately, the judical power of this Court must be brought to bear upon a problem that has come forth both in the early history of the country and in this instance. Elsewhere, the courts of our country

have exercised their judical power to cure other systemic abuses. One example is where the State and Federal Courts of our country impose sanctions, on a routine basis, upon those lawyers who have violated the prior orders or rules of the court regarding attorney misconduct. Similarly, to achieve uniformity in criminal sentencing, guidelines were likewise imposed upon the federal trial courts. Upon acting in a similar manner in this instance, this court will properly serve the goal of judical efficiency and economy. Without question, the proper instruction by this court that the federal trial courts adhere to the Rules of Federal Civil Procedure and legal precedents will lead directly to a reduction in the number of appeals in the Circuit Court(s) of Appeal and in this Court.

CONCLUSION

This determination of the Third Circuit Court of Appeals of June 7, 1994 must be set aside, and the Court instructed to reconsider this matter in conformity with the rule and legal precedents of the court.

Douglas F. Ortelere
Counsel for Petitioner

Dated: September 6, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 92-2835

ORDER

Filed 4/26/93

MOBILE MEDEX, INC.,

Plaintiff,

v.

RAYMOND L. BRAMUCCI, individually, and as Commissioner of the Department of Labor of the State of New Jersey,

Defendant.

This matter having come before the court on plaintiff's appeal of the oral order of; the Honorable Stanley R. Chesler, U.S.M.J., of February 8, 1992, and written order of February 23, 1992, denying plaintiff's motion to file a Second Amended Complaint, pursuant to

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Fed.R.Civ.P. 72 ((a) and District of New Jersedy Local Rule 40(D) (4) (a), and on defendant's motion to dismiss the complaint, pursuant to Fed.R.Civ.P. 12(b)(6), or 56, and the court having considered the submissions of the parties without oral argument, pursuant to Fed.R.Civ. P. 78; and it appearing that plaintiff filed this action seeking declaratory relief, injunctive relief,

1. Although defendant originally moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), defendant has asked the court to treat the motion as one for summary judgment pursuant to Fed.R.Civ.P. 56 because plaintiff has submitted materials outside of the pleadings in its opposition to the motion. Because this matter can be decided under Fed.R.Civ.P. 12(b)(1), I need not treat the motion as one for summary judgment because although the parties have presented materials outside the pleadings, those materials may properlyo be considered under Fed.R.Civ.P. 12(b)(1); Berardi v. Swanson Memorial Lodge No. 48 of the Fraternal Order of Police, 920 F.2d 198,199-200 (3rd Cir. 1990).

general damages and punitive damages pursuant to 28 U.S.C. 1341 (The Tax Injunction Act), the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. 1983, with regard to an assessment of taxes for which plaintiff was found liable after a final administrative action taken by defendant, the Commissioner of the Department of Labor (the "Commissioner"); and

2. The matter began as an administrative appeal from a tax assessment. The New Jersey Department of Labor assessed unpaid taxes against plaintiff pursuant to the New Jersey Unemployment Compensation Act, N.J.S.A. 43:21-1, et seq., for remuneration plaintiff had paid to paramedics, whom the Department of Labor concluded were employees rather than independent contractors. (Defendant's Brief in Support of Motion to Dismiss, hereinafter "Def.Br.", Exh.A). The matter was referred to the Office of Administrtative Law for a hearing before an Administrative Law Judge ("ALJ"). On January 11, 1990 the ALJ reversed the Department's assessment and issued a recommended decision in

it appearing that plaintiff contests the assessment itself and complains of various due process violations arising out of the assessment and administrative appeal process, specifically claiming that it has not been afforded proper review of the Commissioner's administrative determination because the

which she found no contributions were due and owing. The Department of Labor filed exceptions to this decisions, and plaintiff filed cross-exceptions. The Commissioner issued a final decision on April 16, 1990, reversing the ALJ's decision and determining that taxes were due and owing by plaintiff. Id.

Thereafter, plaintiff sought judicial review by appealing the Commissioner's decision to the Superior Court, Appellate Division, which affirmed the Commissioner's decision. It then petitioned the Supreme Court of New Jersey for certification, which petition was denied. It attempted twice, albeit unsucccessfully, to have the Supreme Court reconsider its determination, and finally filed a petition for certiorari to the Supreme Court of the United States, which petition was also denied.

Commissioner (i) acted as both "prosecutor" and "tribunal" in overruling the ALJ's recommended decision, (ii) lacked the expertise to overrule the ALJ, and (iii) failed to review the entire record below before issuing his decision, thereby depriving plaintiff of a full and fair hearing regarding the assessment of taxes, and complains as well that the Appellate Division improperly reviewed the matter because (i) it used an "arbitrary, capricious or unreasonable" standard when New Jersey Court Rules require that the record be reviewed for "substantial credible evidence," and (ii) it violated plaintiff's right to a fair and prompt resolution of this matter because the presdiding judge who determined that the matter would be heard by a panel of two, rather than three, judges also

participated in that review and was somehow prejudiced against plaintiff; see Amended Complaint; Plaintiff's Briefs in Opposition to Motion to Dismiss (hereinafter "Pl.Br." at 8; and

it appearing that plaintiff asks this court to enjoin collection of the assessed tax, order payment of damages to it, and declare certain provisions of the New Jersey Administrative Procedure kAct, N.J.S.A. 52:14B-10, unconstitutional; and

3. Although plaintiff takes issue with the action of the Appellate Division, the complaint in this matter was filed solely against defendant individually and as Commissioner of the Department of Labor.

it appearing that on or about January 4, 1993, plaintiff moved to amend its complaint to add additional allegations, namely that the Commissioner improperly consulted with, and relied upon, and relied upon, members of his staff to assist in the decision-making, failed to review the transcript of proceedings before the ALJ, and that one of the members of the Commissioner's staff was also a member of the staff of the Attorney General who prosecuted the tax matter against plaintiff, all of which operated to deprive plaintiff of its right to a fundamentally fair hearing; and

it appearing that the motion to amend the complaint was heard by the

4. This was plaintiff's second application to amend the complaint. Plaintiff's first application, which added claims for general and punitive damages, was granted by Order of December 4, 1992.

Honorable Stanley R. Chesler, U.S.M.J., on February 8, 1993, and the motion was denied based upon Magistrate Judge Chesler's determination that plaintiff was dilatory in making the motion because it possessed the factual information which it sought to assert in the amended complaint at least ten months prior to its motion; and

5. Although plaintiff claimed that the information which it sought to include in the proposed amended complaint was "discovered" for the first time during the Commissioner's deposition taken on December 14, 1992, Magistrate Judge Chesler found that this information was within plaintiff's knowledge as early as February 14, 1992, i.e. more than ten (10) months before the amended complaint was proposed and before the lawsuit was even filed in this court. See Transcript of Proceedings before Magistrate Judge Chesler at pp. 4-8. Plaintiff had written a letter to the Supreme Court, dated February 14, 1992, in support of its renewed application for certification, in which it raised the same factual issues that it now attempt to include in its proposed amended complaint.

Plaintiff argues that the allegations in this prior correspondence to the Supreme Court were based only on "suspicion" and "belief", and it was only at the Commissioner's deposition that plaintiff actually discovered the facts. Plaintiff fails to indicate, however, how it came to have such "suspicions" and "beliefs" or what steps he took to verify these suspicions and beliefs prior to December 14, 1992. Indeed, plaintiff conducted no discovery until November 16, 1992 when it noticed the commissioner's deposition, over four months after the filing of the initial complaint.

Furthermore, the Scheduling Order of Magistrate Judge Chesler required that any motions to amend the pleadings must be returnable on or before November 23, 1992. Plaintiff did not even notice the deposition of the Commissioner until mid-November. Therefore, althought the deposition was postponed by the Commissioner until mid-December, had it taken place on the originally requested ate, plaintiff's motion to amend the complaint would still not have been filed in compliance with the Scheduling Order, and could have been rejected on that ground alone.

the court being of the opinion that in reviewing a nondispositive order of a Magistrate Judge, a district court will only modify or set aside the portion of the order "found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); D.N.J. Loc. R. 40(D) (4); and

the court being of the opinion that while leave to amend a complaint should be freely granted under Fed.R.Civ.P. 15(a), such leave may be denied for reasons such an undue prejudice, or, in the absence of undue prejudice, "bad faith or dilatory motive, truly undue or unexplained delay . . . or futility of amendment." Bechtel v. Robinson, 886 F.2d 644, 654-55 (3d Cir. 1989) (citing Heyl & Patterson

Int'l. Inc. v. F.D. Rich Housing. Inc., 663 F.2d 419, 425 (3d Cir. 1981), cert. denied, 455 U.S. 1018 (1982)); and

the court being of the opinion that nothing ln the Pebruary 8, 1993 decision was either "clearly erroneous" or "contrary to law"; and

the court being of the opinion that defendant correctly argues that, in any event, the proposed amendment to the complaint would be futile because this court lacks jurisdiction to interfere with New Jersey's assessment of taxes under the provisions of the Tax Injunction Act, 28 U.S.C. 1341 [the "Act"], and principles of federal-state comity;6 and

It being the opinion of the court that the Act forbids federal courts from exercising jurisdiction over certain kinds of claims involving state taxation:

> The district courts shall not enjoin, suspend or restrain the Assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. 1341;7 and

6. The Commissioner contends that this court lacks jurisdiction and, alternatively, urges that the 1983 statute of limitations and res judicata foreclose consideration of plaintiff's claims. Because this court lacks jurisdiction, it will be unnecessary to reach these arguments.

7. The Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a state to administer its own fiscal Operations Tully v. Griffin. Inc., 429 U.S. 68,

the court being of the opinion that the jurisdiction-limiting effect of the Act extends to actions for declaratory judgment and injunctive relief, California v. Grace Brethren Church, 457 U.S. 393, 408-11 (1982); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 299 (1943), actions for damages brought pursuant to

73 (1976). The Third Circuit has held that the Act is a jurisdictional statute. Sipe v. Amerada Hess Corp., 689 F.2d 396 (396 Cir. 1982). Hence, this court cannot hear any matters that fall within the scope of the Act.

In order to determine whether an action falls under the Act the court conducts a two-step analysis. First, the court must determine if the charge at issue constitutes a tax. If it is a tax, then the court must decide whether the state provides a "plain, speedy and efficient" remedy. 28 U.S.C. S1341i see also United Wire, Metal & Machine Health & Welfare Fund v. Morristown Memorial Hospital, 793 F.Supp. 524 (D.N.J. 1992).

1983. see Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100, 115-16 (1981) ("taxpayers are barred by the principles of comity from asserting 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights in state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court"), and encompasses federal constitutional challenges to the imposition of a state tax. See Hardwick v. Cuomo, 891 F.2d 1097, 1100 (3d Cir. 1989) (plaintiff's equal protection challenge to imposition of non-resident tax barred

by the Act); and

the court being of the opinion that the fact that plaintiff raises various due process challenges does not affect the applicability of the Act to the instant action; see Huber Pontiac.Inc. v. Whitler, 585 F.2d 817 (7th Cir. 1978) (Act applied to suit raising due process challenge to procedures for contesting tax assessment); VJG Realty Corp. v. City of New York, 1990 WL 80036 (S.D.N.Y. June 7, 1990); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, 4237 (1988); Coleman v. McLaren, F.Supp. 749 (N.D.Ill. 1985), aff'd, 796 F.2d 477 (7th Cir. 1986) (1983 action against administrators of tax assessment system, including claim of lack of

meaningful hearing, was barred by the Act); and

the court being of the Opinion that a state court remedy satisfies the "plain, speedy and efficient" inquiry of the Act if the state court remedy meets certain minimal procedural criteria, Rosewell v. La Salle National Bank, 450 U.S. 503, 512 (1981), that is, if it "provides the taxpayer with a 'full hearing and judicial determination' at which [ ]he may raise any and all constitutional objections to the tax." Id at 514 (citation omitted;)8 and

the court being of the opinion that New Jersey law provides both administrative and judicial remedies pursuant to which a taxpayer may

contest an assessment,9 and New Jersey courts are empowered to hear and decide federal constitutional challenges with respect to an assessment. See Sipe, 689 F.2d at 404-05 (citing Peper v. Princeton University Board of Trustees, 77 N.J 55, 74

8. An asserted substantive defect in the state remedy does not remove the bar to federal jurisdiction where otherwise adequate procedures exist. Groff v. State of Maryland, 639 F.Supp. 568, 573 (D.Md. 1986) (citing Stretscon Industries, Inc. v. Cohen, 664 F.2d 929, 931-32 (4th Cir. 1981). As long as the taxpayer's federal rights receive full consideration, the remedy is adequate. Rosewell, 450 U.S. at 514-15.

A procedurally " plain" remedy has been found lacking when there is uncertainty surrounding the state remedy, which makes it speculative. See Barringer v. Griffes, 964 F.2d 1278 (2d Cir. 1992). A remedy is not "efficient" if it results in "ineffectual activity or an unnecessary expenditure of time or energy."

(1978); Bung's Bar & Grille, Inc. v. Township Council of Florence, 206 N.J. Super. 432 Law Div. 1985);10 and it appearing that plaintiff never attempted to seek redress of any of

Rosewell, 450 U.S. at 517.

9. A taxpayer may challenge an assessment of taxes by bringing a challenge to the Office of Administrative Law for a full hearing before an ALJ. N.J.S.A. 52:14B-9. A taxpayer is provided with notice of the legal authority of the hearing, the jurisdictional basis for the hearing, the time, place and nature of the hearing, and of its right to appear, respond and present evidence. Id. An ALJ hears the case, which proceeding is recorded, and issues a recommended decision to the agency head. N.J.S.A. 52:14B-10. The agency head then reviews the entire record and makes an independent assessment of the case, including the findings of fact and conclusions of law recommended by the ALJ. Id. The taxpayer may appeal any administrative agency decision to the Superior Court, Appellate Division.

its alleged constitutional violations in the assessment appeal litigation, yet now claims that no "certain", "plain, speedy and efficient" state remedy is afforded it under New Jersey law, contending that the procedures by which it could have challenged the tax are faulty in that the Commissioner made misrepresentations in his opinion which "avoided any possibility of fair review" by the state courts (Pl.Br. at 17), the statutory process by which the Commissioner reviews the ALJ's decision "is not deemed to be a plain remedy" (Pl.Br. at 20), and the "secret and illegal means of decision-making by the Commissioner" somehow "evade[d] any possibility of judicial correction by

the Appellate Division . . ." (Pl.Br. at 22), and denied "plaintiff the opportunity to raise [its] constitutional violations" before "the state courts" (Pl.Br. at 23); and

> the court being of the opinion that plaintiff had an opportunity to raise these claims in the New Jersey courts for, as plaintiff acknowledges by citing In re Morrison, 216 N.J.Super. 143 (App. Div. 1987), those courts clearly have establlshed their receptiveness to such constitutional claims, see also B.C. v. Cumberland Regional School District, 220 N.J.Super. 214,

10. Furthermore, New Jersey has a statute providing for declaratory judgment actions, N.J.S.A. 2A:16-53, which may be used to challenge the validity of a state statute. See Sipe, 689 F.2d at 404-05.

230 (App. Div. 1987) (plaintiff brought federal equal protection claim and court found that head of administrative agency need not review entire transcript of contested proceedings before ALJ in all cases, and may rely upon a summary prepared by subordinate); it could have sought to expand the record in this matter, if necessary, before the Appellate Division;11 or, it could have engaged in a separate

11. Rule 2:5-5 reads, in part:

> The appellate court, on its own motion or on the motion of any party, may order, on such terms as it deems appropriate, that the record on appeal be supplemented by the taking of additional evidence and the making of findings of fact thereon by the agency below or, in exceptional instances, by a judge of the Superior Court especially designated for that purpose.

Clearly, plaintiff could have argued that the Commissioner failed to review the transcript of proceedings before the AlJ, that it was prejudiced by ex parte contacts between the Commissioner and Department personnel, and that the Commissioner improperly relied upon some subordinates to assist him in this case.

Of course, it is highly unlikely that plaintiff would have proceeded very far with its allegations. For example, plaintiff alleges that the New Jersey Administrative Procedure Act is unconstitutional because it permits the Commissioner of the Department of Labor to review initial decisions rendered by A.L.J.'s. It complains that this statutory scheme impermissibly allows the agency head to act as both "prosecutor" and "tribunal." Plaintiff also complains that it is illegal for the Commissioner to rely upon staff within the Department of Labor to assist in the review and drafting of decisions. Both of these arguments are without merit. See KFC National Management Corp. v. NLRB, 497 F.2d 298, 304-05 (2d Cir. 1974), cert. denied, 423 U.S. 1087 (1976) (court has consistently upheld use of hearing examiners relying on staff assistants for recommendations and draft opinions); see also Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978), cert. denied, 439 U.S. 824 (1978) (Administrator is charged with making

state court proceeding to litigate its 1983 claims and thereby availed itself of the discovery mechanisms available in any trial court. Accord Huber, 585 F.2d at 820-21 (plaintiff's due process challenge to Illinois Administrative Review Act that review offered by state is ineffectual is barred by the Act because he could have raised claim

highly technical decisions and evidence "may be sifted and analyzed by competent subordinates.") (quoting Morgan v. U.S., 298 U.S. 468, 481 (1936); National Small Shipments Traffic Conference, Inc. v. Interstate Commerce Commision, 725 F.2d 1442 (C.A.D.C. 1984) (agency decision-making body may delegate detailed consideration of administrative record to its subordinates while retaining final power of decision for itself, and members of the body are free to rely on summaries prepared by agency staff rather than wading through entire record personally); Cumberland, 220 N.J.Super. at 230-31.

in state courts);12 and

the court being of the opinion that although plaintiff claims to have "discovered" allegedly "secret" and "illegal" practices of the

12. In Huber, supra, a case quite similar to the instant one, plaintiff alleged that certain aspects of the hearing procedure for assessing a tax violated his due process rights. Specifically, the plaintiff faulted the state administrative rule which allowed the hearing officer to both preside at the hearing and present the Department of Revenue's case, i.e. act as both "prosecutor" and "tribunal". 585 F.2d at 817-18. He also alleged that the method of review offered by the state was ineffectual because the hearing officer was prejudiced by ex parte communications with Department staff members. The Seventh Circuit held that because the action would "suspend" the state's ability to collect the tax until a later day, and because plaintiff had a plain, adequate remedy in the state courts, the action clearly violated the Act.

Id. at 820-21.

Commissioner only at the Commissioner's deposition on December 14, 1992, this allegation is belied by plaintiff's original complaint, filed in July, 1992, in which it was alleged that the Commissioner failed to review the entire record below, and by its correspondence with the Supreme Court of February, 1992, in which it set forth the identical allegations that it now argues were only "discovered" in December, 1992; see supra, note 5; and

the court being of the opinion that plaintiff cannot be permitted to refrain from raising alleged constitutional deficiencies during the state court proceedings and then claim the state failed to provide an

"efficient" or "plain" remedy Fortune v. Mulherrin, 533 F.2d 21, 22 (1st Cir.), cert. denied, 429 U.S. 864 (1976) ("A complaint under the Civil Rights Act does not provide the springboard for an unhappy state litigant to raise his federal claims de novo in federal court"));13 and it appearing that plaintiff further asserts that it has been denied a "speedy" remedy because of the administrative delay in processing the tax assessment;14 and

13. Even though those remedies may no longer be available because the relevant statute of limitations may have run, a taxpayer's failure to take advantage of a remedy does not render that remedy insufficient. The relevant question is whether the remedy was available originally. See Burris v City of Little Rock, 941 F.2d 717 (8th Cir. 1991).

it appearing that although twelve years allegedly elapsed between the initial hearing requested by plaintiff in September, 1978 following the Department Or Labor's audit and the ALJ's decision issued in January, 1990, this argument was raised in a summary judgment motion before the ALJ, who found that plaintiff was not prejudiced by the delay and that the delay was partially attributable to plaintiff; see Def.Reply Br., Exh. A; and

the court being Of the opinion that plaintiff had a right to seek interlocutory review of that decision

14. The Supreme Court of the United States has held that "[s]peedy" is a "relative concept, and we must assess the . . . delay against the usual time for similar litigation." Rosewell, 450 U,S. at 518.

pursuant to N. J.A.C. 1:1-14.10; to have the matter reviewed after the issuance of the ALJ's decision, pursuant to N.J.A.C 1:1-18-6; or to have this matter reviewed in the appeal process, R.2:2-3, but failed to raise the issue of whether or not it was denied a speedy remedy either in the administrative forum or on appeal and, thus, is barred from raising it in this collateral proceeding; see Wm. Blanchard Co. v. Beach Concrete Co., Inc., 150 N.J.Super. 277, 292 (App. Div.), certif. denied, 75 N.J. 528 (1977) 15 and

the court being of the opinion that, in any event, because it is entirely unclear whether the delay seen here was caused by the

Department of Labor or by plaintiff (see Def.Reply Br., Exh. A), it cannot be concluded that the proceedings were not "speedy" and, therefore, were "inadequate"; see Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428 (2d Cir. 1989) (fact that state court proceedings challenging tax assessment had been pending for over ten years did not demonstrate the

15. In any event, plaintiff did receive some remedy for the delay in the administrative review of the tax assessment. Plaintiff admits that the assessment based upon the 1978 audit was completely withdrawn by the Department of Labor. Pl.Br. at 1-3. In addition, the Department Or Labor withdrew the assessment for the year 1981, pursuant to a statute of limitations period under N.J.S.A. 43:21-14(6). The ALJ further recognized that plaintiff could not be charged interest for an assessment during the time of any delay which wan attributable to the Department of Labor.

absence of "speedy" state court remedy, where delay was due to combination of problems with state court administration and tactical maneuverings by both parties); and

the court being of the opinion that, with regard to plaintiff's claims against the Appellate Division, there is a fundamental defect in that there is no suggestion as to how the named defendant, i.e. the Commissioner, was responsible for the acts of which plaintiff complains;

IT IS on the 26th day of April, 1993

ORDERED that the Order of Magistrate Judge Chesler denying plaintiff leave to file a second amended complaint is hereby affirmed;

and it is further

ORDERED that defendant's motion to dismiss the complaint for lack of subject matter jurisdiction is hereby granted.

MARYANNE TRUMP BARRY

U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MOBILE MEDEX, INC., : Filed 6/22/93

Plaintiff,

v.

RAYMOND L. BRAMBUCCI, individually, and as Commisioner of the Department of Labor of the State of New Jersey,

Defendant.

Civil Action No. 92-2835 (MTB)

ORDER

This matter having come before the court on plaintiff's motion for reconsideration Of this court's Order flled April 26, 1993, pursuant to District of New Jersey Local Rule 12(I), and the court having considered the submissions of the parties without

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oral argument; and

it appearing that plaintiff seeks reconsideration of the Court's order Of April 26, 1993 dismissing the complaint because it was barred by the Tax Injunction Act, 28 U.S.C. 1341 (the "Act"), and affirming the Order of Magistrate Judge Chesler denying plaintiff leave to file a second amended complaint, with plaintiff raising several grounds: (1) this court found that a factual question existed with regard to whether plaintiff had a "speedy" remedy in state court and, therefore, improperly dismissed its complaint (see Plaintiff's Brief in Support of Motlon for Reconslderation, hereinafter "Pl.Br." at 8-12); (2) defendant (the "Commissioner")

B-2.

improperly reversed the Administrative Law Judge's ("ALJ") decision without a thorough review of the record or transcript of proceedings before the ALJ (see Pl.BR. at 13-16); (3) Magistrate Judge Chesler's denial of leave to file a second amended complaint was in violation of Fed.R.Clv.P. 16(a)(3) (see Pl.Br. at 17-18); and (4) this court contradicted itself and had no basis upon which to affirm Magistrate Judge Chesler's order which held that plaintiff had prior knowledge of the claims it sought to allege in its amended complaint and that plaintiff had been dilatory in making the motion to amend (see Pl.Reply Br.); and

the court being of the opinion

that relief under Rule 12(I) is to be granted "very sparingly", Maldonado v. Lucca, 636 F.Supp. 621, 630 (D.N.J. 1986), and is to be limited to matters or controlllng decisions "which counsel believes the Court has overlooked." Id.; and

the court being of the opinlon that plaintiff has not presented any factual matters that could not have been provided in its appeal of Magistrate Judge Chesler's ruling or in its previous submissions1 or any controlling decisions that this court has overlooked. Innovation Data Processing, Inc. v. Int'l Business Machine Corp., 603 F.Supp. 646, 647 (D.N.J. 1984); see D.N.J.Loc.R.

12(I); and

it appearing that plaintiff's first argument is that in this court's April 26, 1993 order, the court hold that it was unclear who was responsible for the delay which apparently occurred between the initial assessment of taxes against plaintiff and the subsequent administrative hearing and decision, and therefore this raises a factual issue as to whether plaintiff

1. Plaintiff has inexplicably seen fit, at this late date, to present the court with additional evidentiary material relevant to the motion to dismiss . Plaintiff does not contend that this evidence was unknown or unavailable to it at the time of that motion; indeed, the evidence was apparently either in plaintiff's possession or available to plaintiff through discovery. Accordingly, I will disregard these belated submissions.

was afforded a "speedy" remedy as required by the Act which factual issue is sufficient to preclude dismissal; and

the court being of the opinion that this court found that the fact that plaintiff's state court proceedings challenging the tax assessment may have been pending for a number of years did not demonstrate the absence of a speedy state court remedy with regard to the claims raised in this court, namely, plaintiff's constitutional challenges to the method of tax assessment [i.e to the Commissioner's method of review and reversal of the ALJ's decision and subsequent imposition of taxes], so as to permit this federal court action challenging the

assessment, because plaintiff did not demonstrate that it ever attempted to raise such challenges in the state court proceeding and, in Any event, did not meet its burden of showing that it lacked a "speedy" remedy in state court for these claims; see Order of April 26, 1993 at 12-13; and the court being of the opinion that it need not address plaintiff's second argument because it dismissed the complaint for lack of subject matter jurisdiction and never reached the merits of plaintiff's complaint, and it need not do so now;2 and

2. The court merely noted in its Order that it was unlikely that plaintiff's arguments, has they been considered on the merits, would have been succesful, See order at 10-11 n.11.

the court being of the opinion that, with regard to plaintiff's third argument that it was improper to affirm Magistrate Judge Chesler's denial of leave to file a second amended complaint because the Pretrial Scheduling Order violated Fed.R.Civ.P, 16(a)(3) in that it required all motions to amend the pleadings be filed prior to the close of discovery,3 which plaintiff claims is "inefficient and ineffectual" (see Pl.Br. at 17), this

3. Fed.R.Civ.P. 16(b) requires the entry of scheduling orders governing, among other things, motions to amend pleadings or to join new parties, the close of discovery, and the filing of motions. Here, the Pretrial Scheduling Order mandated that the time for filing motions to amend the pleidings expired November 23, 1992, and the time for completing discovery expired December 14, 1992.

argument was raised previously in plaintiff's Objections to Magistrate's Order Denying Leave to File Second Amended Complaint and was rejected4 and the court finds it an unpersuasive now as it did before became the Magistrate Judge has the discretion to require that motions to

4. Plaintiff argued then that it was wrong for Magistrate Judge Chesler to strictly adhere to the Scheduling Order provisions in finding its motion to amend its complaint untlmely because "newly discovered" evidence regarding the Commissioner's exparte communications with other Department of Labor personnel somehow justified the timing of its motion. However, Magintrate Judge Chester found that the facts in the proposed second Amended complaint were well known to plaintiff at the time it filed the original complaint and this court found that ruling was not clearly erroneous or contrary to law.

amend the pleadings be made prior to the close of discovery and plaintiff provides no authority to the contrary; and

the court being of the opinion that plaintiff 's final argument that this court somehow contradicted itself in affirming Magistrate Judge Chesler's denial of leave to file a second amended complaint is rejected out of hand;5

IT IS on this 21st day of June, 1993

ORDERED that plaintiff's motion for reconsideration is denied.

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5. It appears from plaintiff's convoluted and confusing brief that it contends this court contradicted itself by finding, on one hand:

> Plaintiff argues that the allegations in [lts letter written to the Supreme Court, dated February 14, 1992, l.e., more than ten months before the amended complaint was proposed] were based only on 'suspicion' and 'belief', and it was only after the Commissioner's deposition that plaintiff actually discovered the facts. Plaintiff fails to indicate, however, how it came to have such 'suspicions' and 'beliefs' or what steps it took to verify these suspicions and beliefs prior to December 14, 1992. . . .

Order at 4 n.5, and, on the other hand, finding that plaintiff's failure to raise these claims earlier was improper. See Pl.Reply Br. at 2-3. Plaintiff lnterprets this court's decision to mean that this court was unable to determine whether plaintiff had prior knowledge or sunpicions of the information it sought to include in its amended complaint and that this court should have held an evidentiary hearing to determine if plaintiff had prior knowledge of that information rather than affirm Magistrate Judge Chesler's order.

Plaintiff's interpretation of this court's decision is wrong and this court finds nothing in its Order that is contradictory. Magistrate Judge Chesler found, after a hearing on plaintiff's request for leave to file a second amended complaint, that the information plaintiff sought to include in its amended complaint was within its knowledge well before the amended complaint was even proposed and, in fact, before plaintiff's initial complaint in this action was even filed. This court found that Magistrate Judge Chesler's order was neither clearly erroneous nor contrary to law, and the language quoted above indicates that plaintiff was unable to demonstrate otherwise, In any event, this court found that such an amendment to plaintiff's complaint would be futile because this court lacked jurisdiction over the entire suit. This court never held, as plaintiff suggests, that it was unable to determine whether plaintiff had prior knowledge of the facts it sought to include in the amended complaint.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS
MARYANNE TRUMP BARRY
Judge

USPO &
Courthouse Bldg
Neward, NJ 07101

August 26, 1993

ORIGINAL FILED WITH THE
CLERK OF THE COURT

Douglas Ortelere, Esq
911 Soldier Hill Road
Oradell, New Jersey 07649

Re: Moblle Medex, Inc. v. Bramucci
Civil Action No. 92-2835(MTB)

Dear Mr. Ortelere:

I am writing this letter in response to your letter dated August 12, 1993 (a copy of which is attached). In your letter, you request that I recuse myself in the above-named case.

C-1

Your letter, quite candidly, is ridiculous. First, of course, there is no pending case in which I could recuse myself, the Case having been dismissed. Second, following your 'reasoning", this case could not have been decided by any district judge in New Jersey given that each one has the "possibility" of an appointment to a higher court. Third, even if this case were still pending and even in your ground for recusal was not so hopeless, one proceeds in federal court by way of motion, not by letter.

Sincerely,

Maryanne Trump Barry
U.S.D.J.

MTB/th

cc: Christopher Leavey, DAG

C-2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MOBILE MEDEX, INC., Filed 11/1/93

Plaintiff,

v.

RAYMOND L. BRAMBUCCI, individually, and as Commisioner of the Department of Labor of the State of New Jersey,

Defendant.

Civil Action No. 92-2835 (MTB)

ORDER

This matter having come before the court on plaintiff's motion that this court recuse itself and vacate any prior determinations in this case, which was dismissed on June 22, 1993;

IT IS on this 1st day of

D-1

November, 1993

ORDERED That plaintiff's motion, being utterly lacking in merit as a matter of law and as a matter of fact is denied.

MARYANNE TRUMP BARRY

U.S.D.J.

D-2.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-5429 & 93-5706

Filed 5/13/94

MOBILE MEDEX, INC.,
Appellant

v.

RAYMOND L. BRAMUCCI, individually,
and as Commissioner of the
Department of Labor of the
State of New Jersey

Appeal from the United States District
Court for the District of New Jersey
D.C. Civil Action No. 92-2835
(Honorable Maryanne Trump Barry)

Submitted Pursuant to Third Circuit
LAR 34.1(a) March 1, 1994

Before: STAPLETON AND SCIRICA,
Circuit Judges and SMITH,
District Judge*

JUDGMENT ORDER

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*The Honorable D. Brooks Smith, United States District Judge for the Western District of Pennsylvania, siitting by designation.

After consideration of all contentions raised by appellant, and essentially for the reasons set forth in the Orders entered June 23, 1993, and November 4, 1993, of The Honorable Maryanne Trump Barry, it is

ADJUDGED AND ORDERED that the judgments of the district court entered June 23, 1993, and November 4, 1993, be and are hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

_____
Circuit Judge

Attest:

_____
P. Douglas Sisk, Clerk

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Filed 6/7/94

Nos. 93-5429 & 93-5706

MOBILE MEDEX, INC.,
Appellant

v.

RAYMOND L. BRAMUCCI, individually,
and as Commissioner of the
Department of Labor of the
State of New Jersey

(D.C. Civ. No. 92-2835)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Justice,
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH and
Lewis, Circuit Judges, and SMITH*,
District Judge*

---

*As to panel rehearing only.

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The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of the Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the court in banc, is denied.

BY THE COURT

_____
Circuit Judge

Dated: June 7, 1994

F-2

Two minutes of tense deliberation, and the the verdict is . . .

the Declaration of Independence refuse to free his slaves?

Because he drew "a significant portion of the comfort of his life from the labor of his slaves," said James P. Shenton, a history professor at Columbia University and amateur expert witness.

"I always would have wanted to be invited to Monticello when Jefferson was entertaining," Professor Shenton added wistfully. "He knew a good bottle of wine."

Solicitor General Drew S. Days 3d defended Jefferson's honor, if not his hostelry. "This is an outrageous proceeding, a tragedy for the entire country," he said. "The prosecution is judging Thomas Jefferson by 20th century standards of political correctness."

By 18th century standards, he said, Jefferson was more paragon than pariah, as his expert witness would attest. Joyce Appleby of the University of California at Los Angeles history department said that Jefferson had "a policy of very informal entertainment" when he became President, forfeiting the grandiose traditions of George Washington and John Adams.

As far as slaves and women were concerned, he "shared most of his opinions with his contemporaries," she said. "How is that hypocritical?"

After two minutes of tense deliberation, all but 78 of the jurors reached an unsurprising verdict: not guilty. Both prosecution and defense seemed relieved.

G-1

Mr. Jefferson Goes on Trial (Without Jury Of His Peers)

Never one to leave sleeping Presidents lie, not even in the historical assessment of their deeds, the Association of the Bar of the City of New York put Thomas Jefferson on trial recently. The Chief Justice of the United States, William H. Rehnquist, presided.

About 400 lawyers, historians and judges packed the association's auditorium on West 44th Street in Manhattan, eager to measure the statesman's words against his deeds. The indictment consisted of three counts: that Thomas Jefferson, third President of the United States, "relentlessly attacked the independence of the Federal judiciary," that he "provided grandly for himself in the manner of a North American Louis XIV" while serving as President and, most vexing, that he "never took the Bill of Rights seriously."

Chief Justice Rehnquist was stern but not unsparing. "Please take as a given that Thomas Jefferson has left a legacy of democratic faith for individual liberty," he said. "You must judge him not by the standards of the present day, but by those that he himself espoused."

Attitude Toward Judiciary

Still, the prosecutor, Charles Ogletree of Harvard University Law School, was relentless. "Thomas Jefferson was eloquent in his writings, but contradictory, inconsistent and hypocritical in his practices," he growled.

How, he asked, could a father of democracy try to bend the Federal judiciary to his will? How could Jefferson promote frugality, but spend $15 million on the Louisiana Purchase? And why would the author of